

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION No. 05-CI-00459

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE ATTORNEY GENERAL,
ex rel. Gregory D. Stumbo, in his official capacity

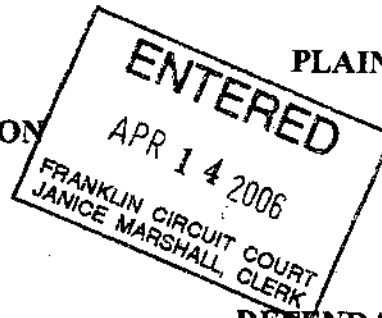
PLAINTIFF

v.

ORDER and OPINION

BOARD OF DIRECTORS FOR THE
COMMONWEALTH POSTSECONDARY
EDUCATION PREPAID TUITION TRUST
FUND, et al.

DEFENDANTS



This matter is before the Court upon the parties' cross motions for summary judgment. The Court has reviewed the record and the applicable law and now **GRANTS** the Plaintiff's, ("Attorney General"), motion.

INTRODUCTION

The Commonwealth Postsecondary Education Prepaid Tuition Trust Fund, ("KAPT fund") was signed into law in April of 2000, with the goal of providing Kentucky families with an opportunity to defray the rising cost of a college education. KAPT allows these families to purchase contracts, at current tuition rates, guarantying the payment of future tuition regardless of inflation. Seventy-five percent (75%) of the abandoned property fund, consisting of stocks and bonds, was pledged to secure these contracts under KRS 393.015. The KAPT Board is obligated to evaluate the actuarial soundness of the fund each year pursuant to KRS 164A.704 (7) and "[t]ransfers from the

abandoned property fund to the trust fund are authorized in order to meet any unfunded liability as determined by the Board." KRS 393.015.

The 2004 actuarial analysis of the KAPT fund showed a deficit. The actuary recommended a transfer of \$13,700,051 because, without such a transfer, the deficit would increase four hundred percent (400%). In December 2004, the Board voted to eliminate the deficit by transferring \$13,700,100 from the abandoned property fund into the KAPT fund. Upon transfer, this money was immediately disbursed into KAPT's various investment accounts.

In 2005, the General Assembly passed HB 267, the biennial budget, which included several aspects of the KAPT fund. First it declared, "the Kentucky Higher Education Assistance Authority shall return the \$13,700,100 transferred to the Kentucky Affordable Prepaid Tuition Program from the KAPT Reserve Fund, by action of the KAPT Board of Directors on December 1, 2004, to the General Fund in fiscal year 2004-2005." The bill went on to say, "No general fund moneys or abandoned property funds shall be available for the support of the Commonwealth postsecondary education prepaid tuition trust fund." Finally, the bill explicitly repealed KRS 393.015, which allowed the KAPT Board to use abandoned property funds to fund the program.

The parties agree that HB 267 binds any future KAPT contracts but disagree as to its applicability to existing contracts. The Attorney General argues that the Board's transfer of the \$13.7 million was proper and these funds, now commingled with private investments, cannot be returned to the General Fund without creating an unfunded liability and compromising existing contract obligations. The Attorney General further argues such a return would amount to an unconstitutional taking and cannot be done.

The Respondent, the Finance and Administration Cabinet, on the other hand, argues that the transfer was premature and therefore void. The Respondent also Cabinet asserts that the money can be returned to the General Fund without affecting the value of any existing contracts.

STANDARD OF REVIEW

Summary judgment is granted when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Only when it appears from the facts that the nonmoving party cannot produce evidence at trial in favor of a judgment on his behalf should summary judgment be granted. *Steelevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The record must be viewed in light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Id.* "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Ky.*, 3. S.W.3d 724, 730 (Ky. 1999). Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted. *Steelevest, at* 482.

DISCUSSION

The parties are in agreement that "the General Assembly cannot prohibit the KAPT Board from accessing the abandoned property fund in the future to pay any unfunded liabilities owed to *current* KAPT Contract holders." (emphasis in original)

The Finance and Administration Cabinet's Memorandum in Support of Summary

Judgment, page 1. However, HB 267 validly repealed KRS 393.015 removing the guarantee of seventy-five percent (75%) of the abandoned property fund from any future KAPT contracts. Despite this repeal, *all* current KAPT contract purchasers have a vested property right in the payment of future tuition and the Commonwealth, through KAPT, has an obligation to see that it is paid.

The contested issue is HB 267's directive that the KAPT Board return the transferred \$13.7 million into the General Fund. The Attorney General contends that the Board found an "unfunded liability" in the fund, the transfer was valid and the General Fund is not entitled to the money. The Respondent claims that the so-called "unfunded liability" was a future liability, not the current liability intended by the KAPT legislation, and this transfer was premature and void, stripping the KAPT fund of any right to the money. Unfortunately, in the KAPT legislation as well as numerous other statutory references to "unfunded liability," the General Assembly failed to provide a definition of this term.

The KAPT legislation is clear on two counts. First, it places a duty on the Board to "Have the actuarial soundness of the fund evaluated by a nationally recognized independent actuary on an annual basis and determine prior to each academic year: ... Whether additional assets are necessary to defray the obligations of the fund." KRS 164A.704(7). Secondly, under KRS 393.015, as it existed at the time of transfer, "Seventy-five percent (75%) of the balance of the abandoned property funds shall be available for support of the Commonwealth postsecondary education prepaid tuition trust fund. Transfers from the abandoned property fund to the trust fund are authorized in order to meet *any unfunded liability as determined by the board.*" (emphasis

added). This language grants the Board the discretion to determine when an unfunded liability exists in the fund and to use the abandoned property fund to “defray the obligations of the fund.”

When the 2004 actuarial analysis was conducted, the actuary Robert Crompton, determined such an unfunded liability. He explained the situation in the following way,

The monies in the Unclaimed Property Fund¹, to my understanding, are not invested or at least not invested in such a way as to accrete in such a way as to accrete at the same rate as the deficit of the KAPT Program. Therefore, it was important that these monies be transferred into the KAPT Fund so that not only would they offset the deficit at the time of the transfer but they would continue to offset the deficit into the future. If these monies had been left in the Unclaimed Property Fund the deficit would continue to accrete but the monies, the \$13.7 million offset would not accrete and there would no longer be such an one-to-one offset.

Crompton Statement, page 14. Upon being presented with this information, the KAPT Board determined, in its discretion, that an unfunded liability warranting a transfer of the abandoned property funds existed. This decision was well within the authority granted by the KAPT legislation, as it existed at the time of the transfer. KRS 446.080 (3) states, “[n]o statute shall be construed to be retroactive, unless expressly so declared.” The General Assembly’s repeal of KRS 393.015, was not “expressly declared” as being retroactive and cannot be applied to actions that were legally taken under that section prior to its repeal. *Commonwealth Department of Agriculture v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000).

In addition, the transferred funds became commingled with private funds in the KAPT investment accounts. In *Armstrong v. Collins*, the Supreme Court stated clearly, “[b]ecause the General Assembly has no authority to transfer private funds to the general

¹ “Unclaimed Property Fund” is used interchangeably with “Abandoned Property Fund.”

fund, the transfer of money from agencies in which public funds and private employee contributions are commingled, and cannot be differentiated, is unconstitutional.”

Armstrong v. Collins, 709 S.W.2d 437, 446 (Ky. 1986). The abandoned property funds have been commingled with private funds and cannot constitutionally be transferred by the General Assembly.

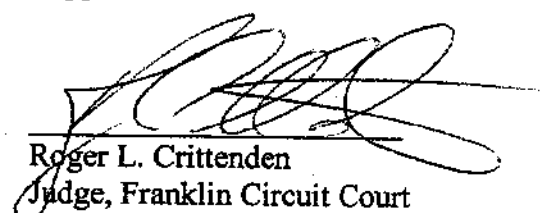
CONCLUSION

The \$13,700,100 transfer from the Abandoned Property Fund to the KAPT Fund was valid and the declaration of HB 267 that the money should be returned to the General Fund is unconstitutional. The Attorney General’s motion for summary judgment is

GRANTED.

SO ORDERED this 4 day of April 2006.

There being no just cause for delay, this is a final and appealable order.



Roger L. Crittenden
Judge, Franklin Circuit Court